

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JARED SALISBURY,)
)
Claimant,)
)
v.)
)
OLD FAITHFUL BEVERAGE COMPANY,))
aka ADMIRAL BEVERAGE, Employer,)
and LIBERTY INSURANCE COMPANY,)
and TRANSCONTINENTAL INSURANCE)
COMPANY, Sureties,)
)
and)
)
LINCARE HOLDINGS, INC., Employer,)
and TRAVELERS PROPERTY)
CASUALTY COMPANY OF AMERICA,)
Surety,)
)
Defendants.)
_____)

IC 2000-504131

2001-021616

2005-002340

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed April 24, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls on August 10, 2006. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. E. Scott Harmon of Boise represented Old Faithful Beverage Company, a/k/a Admiral Beverage (Old Faithful), and its surety Liberty Insurance Company (Liberty). Glenna M. Christensen of Boise represented Old Faithful and its surety Transcontinental Insurance Company (Transcontinental). W. Scott Wigle of Boise represented Lincare Holdings, Inc. (Lincare), and its surety Travelers Property Casualty Company of America (Travelers). Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on February 6, 2007.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether and to what extent Claimant has incurred permanent partial disability (PPD) above his permanent partial impairment (PPI) and, if so,
2. The appropriate apportionment among the three sureties.

CONTENTIONS OF THE PARTIES

This is a consolidated case involving two employers and three sureties. Claimant suffered three injuries to his back in three separate accidents. He contends that he has incurred whole person PPD in excess of his accepted whole person PPI ratings that should be apportioned among the sureties in accordance with the *Carey* formula.

All three sureties contend that Claimant has failed to prove any PPD above his PPI. However, in the event PPD is found, the surety (Liberty) for Old Faithful at the time of Claimant's October 24, 2000 accident (first accident) contends that the injuries Claimant received therefrom had totally resolved and he was returned to work without restrictions before his second, and more serious, accident. Therefore, Liberty is free from any liability.

The surety (Transcontinental) for Old Faithful at the time of Claimant's October 23, 2001, accident (second accident) contends that PPD, if found, should be apportioned according to the percentages of PPI assigned to each accident, i.e., by the *Carey* formula.

The surety (Travelers) for Lincare at the time of Claimant's February 17, 2005, accident (third accident) contends that PPD, if found, should be apportioned only between the sureties involved in the first two accidents as Claimant has been able to continue doing heavy work for Lincare following his third accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Adam Davis, a branch manager for Lincare.
2. Claimant's Exhibits 1-20 admitted at the hearing.
3. Defendant Liberty's Exhibits A-G admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 30 years of age and resided in Ammon at the time of the hearing. He was employed as a service representative at Lincare, a company that delivers home oxygen/respiratory supplies and durable medical equipment. Prior to his employment with Lincare, Claimant worked as a "truck jumper" for Old Faithful, a beverage delivery company, and briefly for FedEx Ground as a delivery person. Claimant described his duties at Old Faithful as helping drivers on their "heavy" days delivering Pepsi bottles and cans.

2. On October 24, 2000, Claimant was "... throwing 12-packs and ended up twisting." Hearing Transcript, p. 23. He experienced a sharp, shooting pain in his right lower back down into his leg. He quit what he was doing and lay down on the loading dock for a while. The next day Claimant presented to Family Emergency Center in Idaho Falls, where he was diagnosed with an acute mild low back strain. He was released to sedentary work and eventually to full duty without restrictions on October 28th.

3. Claimant returned to his regular duties. Except for some fatigue, Claimant was able to do his job. Then, on October 23, 2001, Claimant twisted to throw some soda when he again experienced low back pain, only more intense than after his first accident. He presented to family practitioner John Gietzen, D.O., who diagnosed an acute lumbar strain with radiculopathy and took Claimant off work pending the results of a lumbar MRI. Dr. Gietzen referred Claimant to neurosurgeon Stephen Marano, M.D. Dr. Marano first saw Claimant on November 23, 2001, at which time Claimant was having "virtually no pain." Claimant's Exhibit 14, p. 2. Dr. Marano

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 3

prescribed physical therapy and work hardening. By January 23, 2002, Claimant was back to regular duty but Dr. Marano warned him to be “. . . very careful.”

4. On March 7, 2002, Claimant underwent an IME performed by physiatrist David Simon, M.D. Dr. Simon diagnosed:

Low back pain. This low back pain is most likely related to the L4-5 disc herniation. It is likely that Mr. Salisbury initially herniated this disc in the fall of 2000 when he first developed his back symptoms. The injury of 2/23/01 was an aggravation of this initial injury. He likely had a right L5 radiculopathy related to this, but fortunately the radicular symptoms have resolved.

Claimant's Exhibit 11, p. 5.

Dr. Simon assigned a 5% whole person PPI rating with 1% allocated to Claimant's first injury and 4% to the second.

5. Claimant continued to work for Old Faithful for a few months then voluntarily terminated for fear of re-injury. He then worked for FedEx Ground for two or three weeks then quit due to the awkward style of lifting he was required to do. He then went to work for Lincare where he primarily delivered home liquid oxygen reservoirs weighing about 180 pounds. Claimant testified that he was able to lift the canisters because they were less awkward to lift than the packages he encountered at FedEx. On February 17, 2005, Claimant was reaching across the seat of his delivery van to retrieve some paperwork when he “. . . felt the same pain again. It shot down my leg, really intense.” Hearing Transcript, p. 33. The next day, Claimant saw Flint Packer, D.O., who prescribed physical therapy and took him off work for five days. On February 28, 2005, Dr. Packer took Claimant off work indefinitely pending further evaluation.

6. On March 8, 2005, Claimant returned to Dr. Simon who reviewed Claimant's two MRI's and concluded:

Low back pain and right gluteal pain. He may have an S1 radiculopathy based on the distribution of his symptoms and the decreased ankle reflex. Clinically, this would most likely be due to the L5-S1 disc herniation. His most recent MRI does show a more apparent annular tear of the L5-S1 disc and a disc protrusion, but no obvious impingement on the S1 nerve.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 4

Claimant's Exhibit 11, p. 14. Dr. Simon referred Claimant for a surgical consultation.

7. Claimant returned to Dr. Marano on March 29, 2005. Claimant reported that physical therapy was helping. On April 22, 2005, Dr. Marano continued Claimant's physical therapy and returned him to light-duty work with restrictions.

8. On May 16, 2005, Claimant saw Richard Knoebel, M.D., for an IME. Dr. Knoebel did not find Claimant to be at MMI at the time. He diagnosed nonspecific low back pain without verifiable radiculopathy. He continued Claimant on physical therapy and estimated MMI in three months. Claimant returned to Dr. Knoebel on November 3, 2005. At that time, Dr. Knoebel diagnosed a permanent aggravation of Claimant's pre-existing low back condition. He assigned an 8% whole person PPI with 5% pre-existing. Dr. Knoebel precluded Claimant from medium-heavy work and assigned restrictions. He indicated that Claimant could not return to his heavy lifting job.

9. On December 8, 2005, Claimant underwent a Functional Capacity Evaluation (FCE) at Peak Performance. The FCE revealed that Claimant could lift and carry over 120 pounds and push and pull over 176 pounds and could perform the essential functions of his job duties as described by job description. The FCE placed Claimant in the very heavy physical demand classification.

10. Claimant had worked at Lincare for four years at the time of the hearing, although he was doing more equipment set-ups than before his injury as his pre-injury position had to be filled while Claimant recuperated. However, each employee must be able to perform the same duties as the others.

DISCUSSION AND FURTHER FINDINGS

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 5

“Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

11. Claimant graduated from high school near Portland in 1994. He then attended the University of Oregon in general studies into his sophomore year. After that, Claimant earned a degree as a certified dental lab technician making crowns and bridges. He then worked for a dental lab in Idaho Falls for about a year until the lab went out of business. At that time, Claimant began his employment with Old Faithful.

12. At the time of his last injury, Claimant was earning \$10.50 an hour. He does the same job as the other drivers and Lincare does not accommodate him. At the hearing, Mr. Davis, the

branch manager, informed Claimant that he was to receive a \$1.50 an hour raise effective the following Monday. Lincare is satisfied with Claimant's work and Claimant likes his job and has no intentions of leaving. Claimant has failed to show any loss of earning capacity as the result of any or all of his three industrial accidents.

13. Claimant's education and physical work exertional category (very heavy) have not changed as the result of any injuries. It is difficult to determine exactly what Claimant's labor market was pre-injuries; however, it has not been shown that he has lost access to any portion thereof as a result of any or all of them. The Referee cannot ignore the fact that Claimant is currently employed in his pre-last injury job, he likes it, he has no intention of leaving,¹ and he just got a \$1.50 an hour raise. While Claimant may have to "be careful" to avoid re-injury, such is not a "restriction" that precludes him from performing the essential functions of his job. Claimant's situation is a somewhat infrequent "success story" in workers' compensation; he was injured three times, the claims were accepted, and Claimant received appropriate treatment and ultimately returned to work without accommodation with his time of last injury employer at a higher wage. Therefore, Claimant has failed to show that he has incurred PPD in excess of his 8% whole person PPI.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his entitlement to PPD in excess of his PPI.
2. The issue of apportionment is moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __6th__ day of April, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th__ day of April, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail upon each of the following persons:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

_____/s/_____

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ORDER

Filed April 24, 2007

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove his entitlement to permanent partial disability in excess of his permanent partial impairment.
2. The issue of apportionment is moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __24th__ day of __April__, 2007.

INDUSTRIAL COMMISSION

____/s/_____
James F. Kile, Chairman

____/s/_____
R. D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

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